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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 132

DON WILLIAMS, *Appellant*,

v.

CITY OF WICHITA, KANSAS, *Appellee*.

Appeal from the Supreme Court of the State of Kansas

PETITION FOR REHEARING

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November 8, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING

The Appellant herein respectfully applies for a rehearing of, and an order vacating, this Court's order of October 14, 1963, dismissing this appeal for want of a substantial federal question. As grounds therefor, Appellant states as follows:

The substantiality of the federal questions set forth in the Jurisdictional Statement has been made plain by the judicial history of this litigation. The Supreme

Court of Kansas expressly recognized that "the constitutionality of the Act is actually the single decisive issue of the case" (190 Kan. at 319) and then proceeded to discourse for 24 pages in disposing of the constitutional issues. Such a lengthy discussion is not the mark of insubstantiality.

This voluminous response to the issues by the court below was the culmination of a series of related cases, all of which recognized that the substantiality of the federal constitutional issues was so great as to warrant awaiting definitive resolution by the Supreme Court of Kansas and ultimately by this Court. The trial court itself, in the instant litigation, invalidated the Water Appropriation Act on the basis of the federal constitutional claims and thereby established the substantiality of those claims. And the earlier proceedings resulting in this Court's affirmance in *Baumann* v. *Smrha*, 352 U.S. 863, carefully eschewed any resolution of the federal constitutional issues because of their substantiality and the need for consideration of those issues in the first instance by the Supreme Court of Kansas. See also *Williams* v. *City of Wichita*, 230 F. 2d 959 (C.A. 10).

Thus the full bloom of the constitutional questions finally opened with the decision below. And so substantial were the issues there resolved and so controversial were the results reached that Justice Schroeder was compelled to begin his dissent with the following strong language (190 Kan. at 341):

> Not to be outdone by the legislature in the confiscation of private property, the Supreme Court of Kansas today upholds the constitutionality of the 1945 Water Appropriation Act (G. S. 1949, 82a-701, et seq.) *by decreeing an established prop-*

> *erty right* (one which even the legislature and the city of Wichita recognized) *to be nonexistent.* Kansas decisions declaring the right of the landowner to the underground water in his land to be a common law *vested property right* are inferentially *overruled, and, in effect, the new rule of law is given retroactive application to the time of origin of private land titles by patent from the U.S. Government*—prior to the time Kansas was admitted to statehood. If such *arbitrary* exercise of the *police power* of the state withstands the federal constitutional test of due process, the formula has been found, and the precedent is established, by which all private property within Kansas may be *communized* without cost to the state. [Emphasis in original.]

But the emphasis given in the opinion of the Supreme Court of Kansas (190 Kan. at 341) and in the Motion to Dismiss (p. 11) to Appellant's so-called "right to commence an action for damages" as recognized by the Water Appropriation Act may have created the mistaken impression that the federal constitutional issues decided below are either eliminated or rendered insubstantial.

If such a "right" can be said to exist, however, it is indeed an empty one in light of the definitive holding of the Supreme Court of Kansas that Appellant possesses no compensable property rights stemming from his natural usage of underground water. A damage action as referred to by the Act, Secs. 82a-716 and 82a-721a, relates to "damages proved for any property taken" and to "damage for any injury done to his land or to any water rights appurtenant thereto." Once it has been authoritatively determined, however, that no recognizable property right has been taken, a

damage action cannot be said to lie for any resulting injuries. If the City of Wichita was properly authorized, in light of the federal constitutional objections, to inflict the proven damages[1] upon this Appellant, an action seeking recovery of such damages becomes completely illusory.

Indeed, Appellant has already sought in vain to secure damages pursuant to Sec. 82a-721a. In his petition for rehearing below, pp. 17-18, Appellant asserted that, under established Kansas authorities,[2] the Supreme Court of Kansas at the very least should have remanded this case to the trial court for the award of proven damages. This request was premised on the well-recognized rule that sharp distinctions between equitable and legal actions are no longer recognized and that, even though Appellant was not entitled to an injunction on constitutional grounds, he was entitled to damages on statutory grounds. See *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641. The summary denial of this petition for rehearing forcefully indicated that the Supreme Court of Kansas intended to foreclose any recovery of damages—despite the protestation in its opinion that a damage action is available.

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[1] The fact that there were damages to Appellant's land caused by the City of Wichita's diversion of underground water is uncontested. The trial court found that the total decrease in the value of Appellant's land was $200 per acre, quite apart from the decrease in the land's productivity. See Jurisdictional Statement, pp. 8-9.

[2] See *Provident Mut. Life Ins. Co.* v. *State Highway Comm.*, 155 Kan. 351, 355; *Hultz* v. *Taylor*, 163 Kan. 180, 181 P.2d 515; *McCrum* v. *Corby*, 11 Kan. 464; *Reed* v. *Bestleman*, 97 Kan. 633, 156 P. 718.

Such an action, moreover, is rendered wholly inadequate under the provision of Kansas law (G.S. 1961 Supp., § 12-105) that limits damages to those occurring within three months prior to the accrual thereof.[3] Since Appellant's damages, under that statutory limitation, accrued soon after the City of Wichita first began pumping operations in 1940, the efficacy of the damage action disappears through a combination of limitation periods and the policy against piece-meal and repetitious suits for damages. See *Wildin* v. *City of Hutcheson*, 177 Kan. 671, 282 P. 2d 377 (especially Syllabus 3); *Howell* v. *City of Hutcheson*, 177 Kan. 722, 282 P. 2d 373.

Nor is there any relief to be expected through any of the administrative procedures provided by the Act. Contrary to the contention advanced in the Motion to Dismiss (p. 12), those procedures have been exhausted. As long ago as May 18, 1954, the Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture entered a final order—for purposes of the Water Appropriation Act—that this Appellant had no "vested right to the use of water for any beneficial purpose within the purview" of the Act. A copy of that order is reprinted in the Appendix hereto. That order has in effect been affirmed and approved by the Supreme Court of Kansas. And on the basis of that determination, the Chief Engineer has granted superior and exclusive usage rights to the City of Wichita relative to the artificial pumping of the underground water in question. Appellant is now

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[3] This statute was amended in 1957 to extend the three-month period to one year. But that amendment came too late to benefit the Appellant in any way; and it would in no event alter the present ineffectiveness of a damage action. See dissenting opinion below, 190 Kan. at 359-360.

effectively foreclosed from any right to utilize the underground water even by artificial means;[4] and the damages resulting from the destruction of his right to the natural usage of that water have been accorded no greater status than *damnum absque injuria*.

The result is that the critical constitutional issues arising from the Water Appropriation Act are ripe for decision now and only now. No other remedy exists which would render those issues premature for consideration at this time or which would justify labeling as insubstantial the effort to raise the issues in this litigation. Where federal constitutional issues of substance have been raised and resolved, the existence of other alternative remedies—particularly where those remedies were not held below to bar resolution of the constitutional issues—does not affect the substantiality of those issues. *Rogers* v. *Hennepin County*, 240 U.S. 184, 188-189. Indeed, in the court below (see 190 Kan. at 319), the City of Wichita made no claim relative to the exhaustion of other remedies; it expressly abandoned all issues other than those relating to the constitutionality of the Act. And the Supreme Court of Kansas itself confined its decision to the constitutional issues. The belated effort in the Motion to Dismiss to raise the exhaustion point cannot overcome the plain fact that the federal constitutional issues were both decisive and substantial.

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[4] Sec. 82a-717a of the Water Appropriation Act provides in pertinent part: "No common-law claimant without a vested right, or other person without a vested right, a prior appropriation right, or an earlier permit shall divert or threaten to divert water if such diversion or threatened diversion impairs or would impair any vested right, appropriation right, or right under a permit to appropriate water." See Jurisdictional Statement, App., p. 11a.

The issues themselves are of the greatest substance and importance. As the Jurisdictional Statement makes plain, no decision of this Court has ever held or intimated that a State may inflict a property loss upon a citizen without awarding him some form of just compensation. Certainly the police power of the State, upon which the Motion to Dismiss relies, has never been held to create an exception to the constitutional requirement of just compensation. The acknowledged losses suffered by this Appellant stand as mute refutation of any claim of insubstantiality. In our constitutional way of life, public interest may require appropriation by a State in order to conserve water resources, but it does not require or justify expropriation to the damage of the property owner. See *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 753.

The substantiality of the due process claims achieves unique prominence in this case by virtue of the repeated representations made to this Court by the State of Kansas that the precise property right asserted by this Appellant was recognized by Kansas and was entitled to effective protection. See Jurisdictional Statement, pp. 15-17. If the decision below is allowed to stand, the result is to jeopardize this Court's reliance on those representations, a reliance which led this Court in the Kansas-Colorado litigation to assume that the Kansas common law gave recognition to the type of property interest here asserted by Appellant. See *Colorado* v. *Kansas*, 320 U.S. 383, 399. That fact alone justifies plenary review.

To that fact must be added the express recognition given by the Kansas legislature to the property right here at stake, a recognition that was obliterated and

ignored by the Supreme Court of Kansas in this case. In 1917, as the Jurisdictional Statement notes (p. 17), the legislature declared "underground waters for all purposes to become appurtenant to the lands under which they flow." There can be no question—certainly none is raised by the opinion below or by the City of Wichita—but that this legislative recognition applies to the water of the Equus Beds, since such water concededly is "underground." And the statute makes no distinction between "percolating" or "flowing" underground water; it applies to *all* underground water of whatever kind, shape or description; and it recognizes a property interest in such water *for all purposes.*

More importantly, in declaring underground waters to be "appurtenant" to the lands, the 1917 statute codified the argument made earlier to this Court by the State of Kansas in the Kansas-Colorado litigation. The State had there told this Court that underground water, whatever its description, "belongs to to owner of the soil" and that "an adjoining landowner may not drain percolating water from the lands of his neighbors, make merchandise of the water, and sell it, and that equity will adjoin such drainage of adjoining lands." See Jurisdictional Statement, p. 16. The Legislature subsequently agreed with this description of rights in underground water, including that which is percolating, by providing that such water is "appurtenant" to the land "for all purposes" —thereby recognizing that it may not be lawfully drained off for merchandising purposes by an adjoining landowner. And it was in light of that statute and its background that the Supreme Court of Kansas,

in *State ex rel. Peterson* v. *Kansas State Board of Agriculture*, 158 Kan. 603, 611-612, 149 P. 2d 604, declared that the common law doctrines respecting ownership of underground water continue in effect in Kansas.

Unquestionably, the Legislature passed this statute for the purpose of establishing beyond dispute that underground water of all types belongs to the landowner to use as he sees fit, but only on or in connection with the land to which it is "appurtenant" and consistent with the rights of other landowners. It was designed to prevent and eliminate any judicial change or modification—whether by judicial decision or by judicial construction of other statutes—of the vested property rights to the use of such underground waters. If such property rights be injured or destroyed, the principles of just compensation come into operation.

The failure of the Supreme Court of Kansas to recognize this vested right and its effort to destroy that right retroactively have created federal constitutional issues of the highest moment. Unless the decision below is reviewed and reversed, our fifty States will be constitutionally free to utilize their police powers so as to destroy the use rights of any property owner and to give those rights to another without requiring any form of compensation or damages. Just compensation will have become a dead concept whenever a legislature or court determines to read out of existence long-recognized property rights. Such should not be permitted to happen, at least as long as this Court sits.

CONCLUSION

For the foregoing reasons, this petition for rehearing should be granted, the order of October 14, 1963, vacated, and probable jurisdiction of this appeal noted.

Respectfully submitted,

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November 8, 1963.

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Counsel for Appellant

APPENDIX

Before R. V. SMRHA, Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture

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In the Matter of the Claim of A. B. WILLIAMS and Others for the Determination of Vested Rights to the Beneficial use of water in Harvey County, Kansas.

Order

Now on the 18th day of May, 1954, the Chief Engineer has before him for consideration the claims of A. B. Williams, and others, as more particularly set forth in "Exhibit A" attached hereto showing the names and addresses of said claimants and the legal description of the respective real estate of each claimant; and also having before him for consideration the Alternative Writ of Mandamus in Case No. 39,358 in the Supreme Court of the State of Kansas, and pertinent pleadings filed therein; and also having before him the Order of Determination of vested rights for Harvey County, Kansas, as made and entered on the 15th day of September, 1953; and also having before him the information and data assembled by the survey conducted by him preliminary to the issuance of said September, 1953, Order, and being otherwise informed in the premises finds as follows:

1. That the determination of vested rights as made and entered on September 15, 1953, did not show that A. B. Williams, and the other claimants listed in the attached "Exhibit A", had any vested right to the use of water for any beneficial purpose within the purview of Chapter 390 of the Laws of Kansas, 1945 (G.S. 1949, 82a-701 to 82a-822, both inclusive).

2. That pursuant to the aforecited statute all water within the state has been dedicated to the use of the

people of the state subject to the control and regulation of the state; that the Chief Engineer has no jurisdiction or authority to determine that the claimant A. B. Williams, or any of the other claimants listed in the attached "Exhibit A" are the owners of any of the water under their respective lands, or that they and others own such water jointly.

3. That the Chief Engineer has no jurisdiction or authority to consider or determine the extent of any existing or claimed beneficial use for domestic purposes as a vested right.

4. The Statute provides that: "'vested right' means the right to continue the use of water having actually been applied . . .," and consideraing that subirrigation is not "actual application" under the Chief Engineer's administrative interpretation of the act and because the water so used is not susceptible of measurement as to quantity of water used and the rate of diversion thereof as contemplated by Section 4 of the act, therefore neither A. B. Williams nor any of the other claimants mentioned in "Exhibit A" attached hereto has made any actual application of water for beneficial use in the subirrigation of crops and other vegation upon their respective premises within the meaning of the words "having actually been applied," within the purview of the statutory definition of "vested right"; and that, therefore, said claimants do not have any vested right by reason of subirrigation.

5. That neither the claimant A. B. Williams, nor any of the persons listed on the attached "Exhibit A" otherwise have any vested right for any use other than domestic in any of the waters of the Equus Beds in Harvey County, Kansas.

IT IS THEREFORE THE CONCLUSION AND ORDER of the Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture that the claimant A. B.

Williams, and each and all of the other claimants whose names appear on "Exhibit A" attached hereto, do not have any vested right for the beneficial use of water for the subirrigation of crops or for any other purpose, other than domestic; that the Chief Engineer does not have jurisdiction to make any determination of any vested right for domestic purposes or for the determination of any claim of absolute ownership in water; that the respective claims of the claimants for vested rights be, and each of them hereby are, rejected and denied.

s/ R. V. SMRHA,
R. V. Smrha, Chief Engineer,
Division of Water Resources,
Kansas State Board of
Agriculture.

Exhibit "A"

A. B. Williams, Halstead, Kansas, SE ¼-30-24-2W; SE ¼-19-24-2W; S ½ SW ¼-30-24-2W, Harvey County. (Balance of list not copied)